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# Solidarity as a Fundamental Principle of EU Law

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## Abstract

*This article examines the principle of solidarity in the EU legal order by tracing the evolving contours of its meaning and operation in recent and emerging jurisprudence. It argues that interpreting solidarity through the lens of its underlying drivers (functional, axiological and identity based) offers a conceptually coherent account of its normative scope and boundaries. Solidarity has largely assumed an instrumental character, oriented towards securing the effective operation and systemic stability of the Union and its legal architecture. Yet the principle now stands at a transformative juncture, where a functional rationale no longer suffices to explain how it takes effect. Through instances that defy a purely instrumental logic, the article reconceptualises solidarity as a bearer of shared values and collective identity. This reframing is not only a matter of candour but indispensable for conceptual clarity and for engaging more directly with the constitutional stakes of sovereignty and belonging.*

## Introduction

Today, it is increasingly clear that solidarity functions as more than a political catchphrase or an aspirational ideal that is tied to the integration of the EU and its citizens. It has been invoked before the Court as a constitutional principle; not only as a shield, to substantiate redistributive mechanisms requiring Member State responsibility-sharing during the 2015 refugee incident,<sup>1</sup> but also as a sword, acting as a normative yardstick for assessing the legality of EU action in the energy sector.<sup>2</sup> The Court of Justice of the European Union explicitly recognised solidarity as a principle that “underpins the entire legal system of the European Union”, affirming its constitutional weight

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<sup>1</sup> *Slovakia and Hungary v Council (C-643/15 and C-647/15) EU:C:2017:631.*

<sup>2</sup> *Germany v Poland (C-848/19 P) EU:C:2021:598.*

and breath.<sup>3</sup> More importantly, the General Court, for its part, has characterised solidarity *among Member States* as a “general principle of EU law”,<sup>4</sup> while the Court of Justice, on appeal, has gone further, referring to it as a “fundamental principle of EU law”.<sup>5</sup> This latter formulation, particularly in a constitutional context, signals the Court’s growing willingness to ascribe a broader foundational role to solidarity within the Union’s legal framework, which is to be welcomed.

This enhanced normative force stems significantly from express constitutional references made to solidarity in the Treaties,<sup>6</sup> a development that has amplified its juridical weight and extended its reach into fresh domains of EU policy, particularly following the Lisbon reforms. It also reflects the succession of crises, known as Europe’s so-called ‘polycrisis era’, that have necessitated unprecedented forms of collective action. In each instance of emergency, solidarity has increasingly been central to recovery responses, from EU-level initiatives<sup>7</sup> to broader transnational responses,<sup>8</sup> drawing it closer to the core of the Union’s evolving legal architecture. It is now evident that solidarity is no longer framed exclusively as a tool of crisis management but is instead acquiring a more sustained and principled role in the Union’s constitutional and legal development.<sup>9</sup> Finally, the elevation of solidarity is not an isolated phenomenon; it belongs to a wider approach to constitutional transformation rooted in the constitutionalisation of values and in principle-based reasoning.<sup>10</sup> Thus, the contemporary trajectory of solidarity is best understood within this broader methodology in constitutional reasoning.

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<sup>3</sup> *Germany v Poland (C-848/19 P)* at [41].

<sup>4</sup> *Poland v Commission (T-883/16) EU:T:2019:567* at [69].

<sup>5</sup> *Germany v Poland (C-848/19 P)* at [38].

<sup>6</sup> Notably, Article 2 Treaty on European union (TEU) characterises solidarity as a feature of EU society, while Article 3 TEU highlights some aspects of solidarity among the Union’s core objectives. It is also referred in the preamble of the Charter of Fundamental Rights of the EU as one of the values on which the EU is founded upon. Additionally, various provisions in the Treaty on the Functioning of the European Union (TFEU) embed solidarity across multiple policy areas, including energy, security, and migration. E.g. Articles 67 (2), 80, 194, 122 (1), 222 of the TFEU.

<sup>7</sup> E.g. Council Regulation 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L 433I/23; Regulation 2021/241 establishing the Recovery and Resilience Facility [2021] OJ L 57/17; Council Decision 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335 [2020] OJ L 424/1.

<sup>8</sup> For instance, Treaty Establishing the European Stability Mechanism (Brussels, 2.2. 2012; in force 27 September 2012).

<sup>9</sup> Regulation 2018/1806 of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2018] OJ L 303/39, Article 7, see also Recital 15; Regulation 2022/868 on European data governance and amending Regulation 2018/1724 (Data Governance Act), Data altruism scheme specifically.

<sup>10</sup> This point will be picked up in the next section, see text to fn. 34.

Both the Court’s renewed engagement with the principle of solidarity that is evident in its apparent elevation to a legally justiciable status and the emergence of pending cases<sup>11</sup> in which it may operate as an interpretative tool or a standard of legality suggest that solidarity is poised to assume a more prominent position within the EU’s constitutional architecture. But how far does its reach truly extend? First, can solidarity now be understood as an overarching legal principle, applicable even in areas where it lacks explicit textual grounding in the Treaties, for instance on the pressing issue of environment protection and climate change? Second, can it be used with equal force in all contexts? Finally, how does solidarity interact with other foundational concepts, such as sovereignty and national identity? This article seeks to address these questions that remain unaddressed by tracing the rise of solidarity to an overarching principle, presenting its conceptual boundaries, and situating competing accounts within that trajectory, with a view to contributing to the ongoing vibrant debate on solidarity’s evolving normative role in the EU legal order.<sup>12</sup>

Beyond setting out the emerging boundaries of this evolving principle, the article proposes a new analytical framework for understanding and reconstructing the reasoning that structures claims to solidarity. For clarity, the article does not intend to wade into semantic debates about what solidarity must look like, for two reasons. First, solidarity, as a principle, is naturally rather vague, and it does not need a *clear* definition to operate. Second, the article adopts the prevailing usage in contemporary legal and political discourse: a readiness to assist others in need, even at some cost to oneself, often grounded in reciprocity and at times in enlightened long term self-interest.<sup>13</sup> In fact, as the article later shows, most normative accounts in practice lean toward instrumental considerations, such as sustaining common goods, sharing risks, and stabilising or preserving institutional structures (instrumental solidarity). Alongside this approach runs a value based current grounded in ideals such as fairness and dignity, with a universal reach (value-laden

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<sup>11</sup> *Poland v Parliament and Council (C-451/23)* [2023] OJ C 304/18 (concerning the legality of the Regulation 2023/857, which raises the EU’s greenhouse gas emission reduction targets to 40% by 2030); *Assemblée nationale de la République française (C-553/24)* [2024] OJ C 5616 (concerning the legality of the Regulation 2024/1351 on asylum and migration management amending Regulations 2021/1147 and 2021/1060 and repealing Regulation 604/2013, [2024] OJ L 135); *Varo Energy (C-358/24)* [2024] OJ C 5076 (challenges the Temporary Solidarity Contribution under Regulation 2022/1854, raising issues of competence, proportionality, and Charter rights).

<sup>12</sup> A rich body of research now examines various dimensions of solidarity, including its normative significance, its reach across different regulated sectors, and its status as a constitutional principle. For most recent analysis, among others, see X. Groussot and E. Karageorgiou (eds), *Special Issue on the Principle of Solidarity in EU Law* (2023) 6 *Nordic Journal of European Law*; Y. Marique; T. Konstantinides and E. Küçük (eds), *Special Issue: A Response to External and Internal Threats of Division and Fragmentation? Revisiting European Solidarity in the Aftermath of Crises* (2024) 31 *Maastricht Journal of European and Comparative Law*.

<sup>13</sup> My view largely accords with Rainer Forst’s account, except that I extend it to include solidaristic relations that do not depend on reciprocity. R. Forst, “Solidarity: Concept, Conceptions, and Contexts” in A. Sangiovanni and J. Viehoff (eds), *The Virtue of Solidarity* (Oxford: Oxford University Press, 2024), pp. 38–41.

solidarity). For further clarity, solidaristic action can also spring from altruism or duty rooted in social bonds, identity, and belonging (identity-based solidarity). The conception of solidarity developed here is intentionally capacious, designed to capture the phenomenon as it manifests in legal and political practice.

This breadth naturally prompts a fair question: if a norm instructs actors to act in solidarity, why should the reasons matter, why should the justificatory grounds matter, particularly when the inquiry concerns the concept's normative perimeter? They matter because we are dealing with a principle, and indeed one articulated and elevated through judicial reasoning. The underlying rationales determine the identity of duty-bearers and beneficiaries, the stringency of the obligation, and the conditions of its limitation; they also structure the principle's consonance or friction with associated constitutional commitments. Examining solidarity through its justificatory engines therefore yields essential clarity about reach and restraint. It discloses when solidarity operates as an instrument of systemic preservation and when it inaugurates duties of protection, and it illuminates the difficulties that arise when the principle is asked to travel across diverse doctrinal and institutional settings. And yes, these rationales can coexist. This does not lessen the methodological value of a rationality-based account; it clarifies why solidarity does not appear with the same rigour across contexts and why particular normative demands take the forms they do. Building on its justificatory bases, the article advances a novel and reason-sensitive framework that distinguishes three recurrent strands of solidarity: an instrumental strand, a value-laden strand, and a communal strand. Read together, these strands provide a map for identifying the principle's reach, and the conditions for its constitutionalisation. The article argues that explicitly acknowledging axiological and identity-based solidarity, rather than recasting it in functional terms, not only enhances conceptual clarity but also enables a more coherent and credible doctrinal framework for addressing disputes in which questions of subsidiarity and sovereignty are at stake.

This article proceeds as follows. First, it charts the rise of solidarity in the case law, from sector-specific references to its recognition as a *general* and ultimately *fundamental* principle, and sets out what that status potentially entails for the Union legal order. After addressing the constitutional status, the article demonstrates how underlying rationales shape the principle. Second, it sets out an instrumental conception of solidarity as a tool of system preservation and shows that this conception dominates current case law. Third, it analyses its value-laden expressions, with examples from asylum responsibility sharing and energy policy. Fourth, it examines the communal dimension through Union citizenship and makes the case for an identity-based understanding of solidarity that can provide clearer doctrine beyond functional reasoning. Fifth, it considers its

relationship with sovereignty and reflects on how when the two principles pull in different directions solidarity can prevail.

### **An overarching principle of EU law**

Solidarity has figured in EU adjudication since the early case law,<sup>14</sup> but for the normative evolution of this principle as an overarching constitutional principle, the *OPAL* case stands out as particularly significant.<sup>15</sup> It is important to note that this case specifically concerned energy solidarity, anchored explicitly in Article 194(1) TFEU,<sup>16</sup> which formed the legal basis for the General Court's determination that the contested decision violated EU law.<sup>17</sup> The dispute arose from a Commission decision that allowed Russia's Gazprom to expand its use of the OPAL pipeline, raising concerns about regional energy security. Poland contended that this shift would enable substantial volumes of gas to bypass traditional transit routes through its territory, undermining its energy security. It argued, *inter alia*, that the Commission failed to assess the implications of the decision, and thereby, infringed the principle of energy solidarity enshrined in Article 194(1) TFEU. At the heart of the legal debate was the enforceability and scope of the "principle of energy solidarity". Rejecting the arguments that energy solidarity, as expressed in Article 194(1) TFEU, is merely an abstract political concept and relevant only in emergencies, the General Court affirmed that solidarity constitutes a justiciable legal principle applicable beyond crisis situations.<sup>18</sup> This was the first instance where solidarity has been employed as a standard of legality, arguably representing a key moment in the evolution of solidarity within the EU legal order.

As a legal standard, the General Court has articulated the material substance of the principle of solidarity with some clarity. This principle is not confined to emergency situations; it is a standing obligation that governs the ordinary exercise of energy competences, rather than a device reserved for exceptional circumstances.<sup>19</sup> Furthermore, it requires decision-makers to go beyond merely

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<sup>14</sup> For example, *Commission v Italy* (39/72) EU:C:1973:13.

<sup>15</sup> *Poland v Commission* (T-883/16).

<sup>16</sup> Article 194(1) TFEU provide that "[i]n the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks".

<sup>17</sup> *Poland v. Commission* (T-883/16) at [83].

<sup>18</sup> *Poland v. Commission* (T-883/16) at [70-71].

<sup>19</sup> *Poland v. Commission* (T-883/16) at [71].

considering the common interests of Member States and also take into account the specific vulnerabilities faced by individual Member States.<sup>20</sup> This reading demonstrates that solidarity is inherently reciprocal relationship between the Union and each Member State, rather than unilaterally oriented towards a common interest.

Equally significant, however, is the way in which the General Court applied solidarity primarily as a *procedural principle* in its legality assessment. The General Court found a breach because the Commission neither carried out nor evidenced an assessment that identified the effects on Poland, including the medium term implications of diverting gas flows for Poland's energy policy, and that balanced those effects against the increased security of supply it had found at EU level.<sup>21</sup> The Court's concern was therefore with the decision-making process; it checked whether the relevant factors were considered, not whether the final balance was optimal. In adopting this perspective, the Court limits its own judicial review to verifying that the interests of all relevant parties have been adequately considered. This procedural framing allowed the Court to carefully strike a balance, enhancing the enforceability of solidarity while simultaneously confining judicial oversight mainly to procedural compliance, thus leaving the substantive definition and operationalisation of solidarity largely in the hands of the decision-maker.

Rather than the Commission, Germany challenged the General Court's ruling on the infringement of the solidarity principle under Article 194 TFEU. Its grounds for appeal were that the General Court erred in recognising solidarity as a justiciable and binding legal principle applicable beyond emergencies, and in concluding that the Commission had failed to account for it, and by requiring it to be mentioned, in addition to raising procedural arguments.<sup>22</sup> The Court of Justice, sitting in the Grand Chamber, dismissed the appeal in its entirety. It reaffirmed that the principle of energy solidarity is a justiciable principle that has legally binding effect on the legislator, Member States and the Institutions alike,<sup>23</sup> and is applicable beyond emergencies.<sup>24</sup> The Court refused to examine the factual analysis carried out by the General Court in its conclusion that the Commission failed to account for the principle,<sup>25</sup> while it also pointed out that the General Court's annulment was

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<sup>20</sup> *Poland v. Commission (T-883/16)* at [72, 77].

<sup>21</sup> *Poland v. Commission (T-883/16)* at [80-83].

<sup>22</sup> *Germany v Poland (C-848/19 P)*.

<sup>23</sup> *Germany v Poland (C-848/19 P)* at [43-44].

<sup>24</sup> *Germany v Poland (C-848/19 P)* at [69].

<sup>25</sup> *Germany v Poland (C-848/19 P)* at [87].

based not on a lack of any reference to the principle of solidarity, but rather on insufficient statement of reasons.<sup>26</sup>

Beyond recognising this principle as a legal standard, in the *OPAL* case, both the General Court and the Court of Justice acknowledged the broad reach of solidarity, casting it as a principle that underpins the entire EU legal order.<sup>27</sup> That recognition matters. It signals not just the importance of solidarity in abstract terms, but hints at the potential breadth of its application across EU law. Yet, the two courts chose their words differently: the General Court labelled *solidarity between the Member States* a “general principle”, while the Court of Justice raised the stakes, without reserving the context to inter-state relationship, calling solidarity nothing less than a “fundamental principle”.<sup>28</sup>

### *A General Principle*

The deliberate choice of language in defining solidarity, specifically, its designation as a general principle of EU law, is significant. Although scholarly debate continues regarding the precise criteria for identifying such general principles,<sup>29</sup> the term general principle is commonly used to refer to judge-made principles that have the above attributes inferred from constitutional traditions common to both the Member States and the EU itself.<sup>30</sup> These principles hold constitutional stature, distinguishing them from other normative standards. Their elevated status grants them overarching applicability, enabling their extension into areas not explicitly entrenched in constitutional texts, thereby embedding them implicitly within the EU legal order.

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<sup>26</sup> *Germany v Poland (C-848/19 P)* at [98].

<sup>27</sup> Respectively, *Poland v. Commission (T-883/16)* at [69]; *Germany v Poland (C-848/19 P)* at [41].

<sup>28</sup> See, respectively, *Poland v. Commission (T-883/16)* at [69]; *Germany v Poland, (C-848/19 P)* at [38].

<sup>29</sup> T. Tridimas, *General Principles of EU law* (Oxford: Oxford University Press, 2007) (providing a definition based on the attributes of general principles). For a definition based on functions, see A. Arnall, “What is a General Principle of EU Law?” in Stefan Vogenauer and Rita de La Feria (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law* (Oxford: Hart Publishing, 2011), p. 355. See also, K. Lenaerts and J. A. Gutiérrez-Fons, “The Constitutional Allocation of Powers and General Principles of EU Law” (2010) 47 *Common Market Law Review* 1629.

<sup>30</sup> While the Treaties now codify certain judge-made principles such as proportionality (Article 5 TEU), legal scholars debate whether these codified norms truly qualify as general principles of law. Compare, for example, G. de Búrca, “Subsidiarity and Proportionality as General Principles of Law” in U. Bernitz and J. Nergelius, *The General Principles of EC Law* (The Hague: Kluwer law international, 2000), pp. 103, 104 (considering subsidiarity as a general principle), with C. Hilson, “Rights and Principles in EU Law: A Distinction without Foundation” (2008) 15 *Maastricht Journal of European and Comparative Law* 193, 195 (adopting a narrower view on what qualifies as a general principle).

Solidarity itself is intrinsically multidimensional, as demonstrated by various typologies that illustrate its complexity.<sup>31</sup> Treaty provisions explicitly addressing solidarity, such as Article 122 TFEU (financial emergencies), Article 80 TFEU (migration), Article 194 TFEU (energy), Article 222 TFEU (civil protection and terrorism), predominantly deals with inter-state relationships,<sup>32</sup> empowering the Union to implement solidarity-driven measures and imposing obligations on Member States to act in a spirit of solidarity. These provisions do not only mark the intrinsic place of solidarity within the EU legal framework, but also reflect both its constitutional nature and its broad application in inter-state contexts. Collectively, these Treaty references and solidarity's foundational status among EU values provide a robust foundation for characterising it as a general principle of EU law. Moreover, as established in case law, solidarity has indeed the potential to serve as a concrete standard of legality in judicial review. Nevertheless, this characterisation explicitly excludes the deeper and socially embedded dimensions of solidarity between the individuals, which national constitutional traditions often place at the centre through an emphasis on interpersonal and intergenerational elements that aim to address vulnerabilities within society as a fundamental objective.

### *Fundamental principle*

As mentioned above, on appeal in *OPAL*, the Court of Justice affirmed the General Court's finding that a violation of the principle of energy solidarity justified annulling the contested measure. Importantly, the Court openly recognised solidarity as underpinning the EU legal order, describing it as a fundamental principle without restricting it solely to relations between Member States. Two questions arise from these different terminologies. First, how does a 'fundamental' principle differ from a 'general' principle? Second, could designating solidarity as a fundamental principle suggest its application extends beyond purely inter-state solidarity?

As to the first question, it is arguable that, from an enforcement perspective, the distinction between fundamental and general principles has limited practical significance.<sup>33</sup> Each category

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<sup>31</sup> Sangiovanni, for instance, distinguishes national solidarity as obligations among citizens and residents within each state, member state solidarity as obligations among states, and transnational solidarity as obligations among EU citizens across borders. A. Sangiovanni, "Solidarity in the European Union" (2013) 33(2) *Oxford Journal of Legal Studies* 217. See also, P. van Cleynenbreugel, "Typologies of solidarity in EU law: A non-shifting landscape in the wake of economic crises" in A. Biondi, E. Dagilytė, E. Küçük, *Solidarity in EU law* (Cheltenham: Edward Elgar 2018) p. 13 (identifying four categories of solidarity; liberalising, redistributive, constitutive, and administrative).

<sup>32</sup> One can add Article 4(3) TEU on principle of sincere cooperation, to the extent that compliance to obligation to EU law requires compromises on the side of the Member States for the benefit of the general good.

<sup>33</sup> It is worth noting that the President of the Court, writing in an extra-judicial capacity, draws an explicit distinction between these two concepts, arguing that solidarity was not originally intended to serve as a general principle of EU

possesses a wide ambit and functions as a standard of legality and a canon of interpretation, although the epithet ‘fundamental’ may shift the justificatory burden and warrant a more exacting intensity of review. The designation fundamental signals constitutional weight. Thus, the label fundamental chiefly denotes the principle’s special constitutional importance, which is partially supported by its structural role within EU law. This, in turn, explains the methodological divide in identification. General principles are drawn by the Court from the corpus of Union law and the common constitutional traditions, whereas a fundamental principle is recognised because it configures the basic architecture of the legal order. On this view, solidarity stands as a core pillar of the Union’s constitutional architecture and to be treated as a fundamental principle.

This usage of the term ‘fundamental’ also forms part of a broader jurisprudential turn in which the Court elevates Article 2 TEU values and cognate structural principles to the rank of fundamental principles.<sup>34</sup> This is best understood when one reflects on broader case law, where along with solidarity, the Court has elevated rule of law to a fundamental principle. An illustration of this understanding appears clearly in the *Budget Conditionality* cases,<sup>35</sup> where the Court again identified solidarity as a fundamental principle, alongside the rule of law, whose justiciability was at the heart of the disputes concerning the EU Budget Conditionality Regulation.<sup>36</sup> The central issue in these cases was the validity of the Regulation’s conditionality mechanism, which empowered EU institutions to withhold funding from Member States that breached rule of law principles in ways directly affecting the Union’s financial interests.<sup>37</sup> In affirming the mechanism’s legality, the Court clarified the binding legal nature of the principles listed as ‘values’ in Article 2 TEU, particularly the rule of law, thus resolving longstanding uncertainty regarding their enforceability. Moreover, the Court explicitly articulated the relationship between the rule of law, mutual trust, and solidarity. In the Court’s view, the EU budget operates as a primary tool for realising solidarity, whose effective implementation depends on mutual trust among Member

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law. K. Lenaerts and S. Adam, “La solidarité, valeur commune aux États membres et principe fédératif de l’Union européenne” (2021) 57 Cahiers de droit européen 416.

<sup>34</sup> A. von Bogdandy and L.D. Spieker, “Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges” (2019) 15 European Constitutional Law Review 391 (construing Article 2 TEU values as norms amenable to judicial enforcement). For a critique of this approach, see F. Schorkopf, “Value Constitutionalism in the European Union” (2020) 21 German Law Journal 956, 963 (urging the Court to resist refashioning the Union through expansive reliance on foundational values).

<sup>35</sup> *Hungary v Parliament and Council (C-156/21) EU:C:2022:97* at [129]; *Poland v Parliament and Council (C-157/21) EU:C:2022:98* at [147].

<sup>36</sup> Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I.

<sup>37</sup> Articles 4 and 6.

States regarding the responsible use of shared financial resources.<sup>38</sup> This trust, in turn, presupposes Member States' adherence to obligations arising under EU law and their respect for foundational values, including the rule of law.<sup>39</sup> Ultimately, the Court reaffirmed solidarity as a fundamental principle of the EU legal order, thereby reinforcing its significance within the Union's constitutional framework.<sup>40</sup>

It follows that recognising solidarity as a fundamental principle allows it to be invoked in areas lacking express Treaty reference, meaning it is not context-bound. This is of considerable importance. One area, solidarity is not elevated into an explicit obligation is the environmental policy, where EU exercises competences where solidarity is highly relevant in emission reductions.<sup>41</sup> Another critical area is data governance,<sup>42</sup> where the principle of solidarity can underpin the data sharing schemes, manifested in policies designed to overcome data gaps, digital divides, and pool strategic resources. Nonetheless, whether this elevated constitutional status translates into consistent persuasive authority for the principle is a distinct matter, which the subsequent analysis will address.

### **Solidarity as a functional necessity**

Solidarity, as a normative principle, has been primarily defined and driven by the pursuit of shared objectives among members of a community. Understood in this sense, solidarity prioritises the general interest of community, even if achieving such a collective goal may require temporary sacrifices from certain members more than others. For clarity, the rationale here is not centred upon addressing or remedying the vulnerabilities of specific individuals or groups *per se*; rather, it operates in a more transactional mode, focused on securing broader benefits for the community as a whole. Such sacrifices are expected from those disadvantaged in a particular instance because membership of the community carries the promise that all participants will ultimately benefit from this arrangement in one form or another over time.

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<sup>38</sup> *Hungary v Parliament and Council (C-156/21)* at [232].

<sup>39</sup> *Hungary v Parliament and Council (C-156/21)* at [128].

<sup>40</sup> *Hungary v Parliament and Council (C-156/21)* at [129].

<sup>41</sup> Regulation 2023/857 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet com [2023] OJ L 111.

<sup>42</sup> Regulation 2022/868 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act) [2022] OJ L 152.

The Court's early invocations of solidarity exemplify its instrumental rationale. Member States and undertakings alike were required to moderate their immediate interests where the proper functioning of the market so demanded. That functioning serves the common interest of all in the long term, including those asked to shoulder short term costs. A precise illustration comes from *Klöckner Werke v Commission*,<sup>43</sup> where the Court characterised the Article 58 of the Treaty establishing the European Coal and Steel Community quota regime as “based on solidarity between all Community steel undertakings” and as a scheme that “seeks an equitable distribution of the sacrifices arising from unavoidable economic circumstances”.<sup>44</sup> It explained that quotas respond to a manifest sector wide crisis that threatens all undertakings, and that the system pursues a general contraction of supply with sacrifices shared equitably and sustained by “a display of Community solidarity”.<sup>45</sup> On that footing, a plea of necessity grounded in the survival or profitability of a single firm cannot prevail, since individual exemptions would trigger a chain reaction and destroy the scheme.<sup>46</sup>

This instrumental conception of solidarity not only undergirds the Court's early market-integration jurisprudence, but it also features prominently in its more recent judgments in different contexts. The case law concerning solidarity in the area of migration management is instructive in that end. A good example is *Jafari* ruling,<sup>47</sup> where the Court explained that solidarity underpins the core rule for responsibility allocation for processing protection applications under the Dublin Regime, namely country of first entry, and that this rule cannot be set aside even in emergencies. The logic is that Member States' cooperation (solidarity) is required precisely because the common system, in this case the Dublin system, would not function effectively without mutual accountability. The Court considered that, by being responsible for those who cross EU's external borders, the country of first entry is acting in solidarity with the other states that keep their borders open.<sup>48</sup> The ruling illustrates an instrumental logic by presenting solidarity as an essential prerequisite for preserving the functioning and sustainability of the EU's asylum system. The ruling also articulates explicitly that solidarity serves the practical necessity of maintaining the overall effectiveness and integrity of a system based on mutual trust and interdependence.<sup>49</sup> One should grant that Dublin has generated uneven responsibility sharing in the asylum context for placing greater pressure on

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<sup>43</sup> *Klöckner-Werke v Commission* (263/82 R) EU:C:1983:373.

<sup>44</sup> *Klöckner-Werke v Commission* (263/82 R) at [17].

<sup>45</sup> *Klöckner-Werke v Commission* (263/82 R) at [18-19].

<sup>46</sup> *Klöckner-Werke v Commission* (263/82 R) at [20].

<sup>47</sup> *Jafari* (C-646/16) EU:C:2017:586.

<sup>48</sup> *Jafari* (C-646/16) at [85].

<sup>49</sup> *Jafari* (C-646/16) at [88].

border states, which are often the first country of entry. Seen from this perspective, a solidaristic construction of the scheme is counterintuitive. Nevertheless, *Jafari* concerned immigration control under a common regime, and Article 80 TFEU carries the solidarity and fair sharing command into both asylum policy and immigration management.

### **Axiological (value-laden) solidarity**

Although the Court typically frames solidarity in instrumental terms, asking Member States to incur short term costs to preserve Union stability, share risk, and sustain common regimes, the constitutional principle runs deeper. It also carries duties of protection toward those who are weaker or more exposed to harm, because solidarity can be value laden. On this view, assistance is grounded in ethical imperatives such as respect to human dignity and fairness that generate commitments even in the absence of close social ties or reciprocal advantage. Garben, for instance, advances a dignity and reciprocity-based account of solidarity that grounds redistributive duties in protecting agency and social inclusion, while also orienting them to the common good by sustaining shared Union projects and collective goods.<sup>50</sup> Similarly, Eleftheriadis advances a corrective justice-based account of solidarity that grounds redistributive duties in repairing structural imbalances and asymmetric risks arising from economic integration, while orienting them to the common good by safeguarding the stability and integrity of the Union’s cooperative venture.<sup>51</sup>

This aspect of solidarity is not missing from EU primary law. For instance, the Treaty explicitly articulates solidarity in asylum matters, under Article 80 TFEU, intertwining it closely with fairness in responsibility sharing. The Charter’s Preamble frames dignity, freedom, equality and solidarity as “indivisible” and “universal”, a lens that, as Garben argues, reads solidarity beyond crisis-management and guards against exclusionary in-group/out-group logics in areas like asylum and migration.<sup>52</sup> Taken together, these sources support a value-laden understanding of solidarity that complements its functional role in sustaining common regimes.

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<sup>50</sup> S. Garben, “Dignity- and reciprocity-based solidarity as the normative framework of the EU’s constitutional settlement” in A. C. Hartzén, A. Iossa and E. Karageorgiou (eds), *Law, Solidarity and the Limits of Social Europe* (Cheltenham: Edward Elgar, 2022), pp. 178–181.

<sup>51</sup> P. Eleftheriadis, *A Union of Peoples* (Oxford: Oxford University Press, 2020), pp. 206–208.

<sup>52</sup> S. Garben, “The (slow) redress of the “solidarity deficit” in the EU and the emerging principle of solidarity in EU law” (2024) 31(6) *Maastricht Journal of European and Comparative Law* 768–769.

In practice, however, this principle has been developed more on instrumental grounds. When the legality of the Mandatory Relocation scheme was challenged, the Court upheld the contested Decision on the grounds of the principle of solidarity and fair sharing of responsibility.<sup>53</sup> The principle was used to support the enforcement proceedings open against the States that failed to implement the Decision.<sup>54</sup> According to the Court, the aim of solidarity would be compromised if the defendant Member States were allowed to excuse themselves from their share of responsibility based solely on their own judgment that the relocation mechanism was ineffective or flawed.<sup>55</sup> As Advocate General Sharpston put it in the Relocation Cases, solidarity is incompatible with unilateral opt-outs: “one to shoulder collective responsibilities and (yes) burdens to further the common good”.<sup>56</sup> Advocate General Bot also considered solidarity as an ‘existential value’ that was ‘both the *raison d’être* and the objective of the European project’.<sup>57</sup> The concept of instrumental solidarity is also compellingly described by President Lenaerts, in his extrajudicial writing.<sup>58</sup>

A sharp observer may note that the architecture of the relocation scheme, above all its calibrated quota mechanism based on factors such as population and economic strength, rests on a foundational commitment to equitable distribution of responsibility. The design operates as a direct and concrete response to the constitutional demand in Article 80 TFEU, which requires *fairness* and solidarity in sharing protection responsibilities. However, the Court’s legal reasoning gives emphasis on the need to preserve the functional integrity of the Common European Asylum System and the Schengen area against the risk of collapse, and on the legal duty to give effect to Article 78(3) TFEU. Solidarity appears less as an independent moral imperative and more as a governing and structural constraint that shapes the lawful use of emergency powers. The result is a validation that speaks in the register of institutional survival and system maintenance, closer to the instrumental logic evident in *Jafari* than to a jurisprudence that builds out a value driven conception of solidarity.

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<sup>53</sup> *Slovakia and Hungary v Council (C-643/15 and C-647/15)*.

<sup>54</sup> *Commission v Poland and others (C-715/17, C-718/17 and C-719/17)* EU:C:2020:257.

<sup>55</sup> *Commission v Poland and others (C-715/17, C-718/17 and C-719/17)* at [180].

<sup>56</sup> See, e.g., the *Opinion of Advocate General Sharpston in Commission v Poland, Hungary and the Czech Republic (C-715/17)* EU:C:2019:917 at [253].

<sup>57</sup> *Opinion of Advocate General Bot in Slovakia and Hungary v Council (C-643/15 and C-647/15)* EU:C:2017:618 at [17-19].

<sup>58</sup> K. Lenaerts and S. Adam, “Sink or Swim Together: Solidarity between the Member States as a Foundational Principle of the European Union” in C. Barnard, A. Lazowski, and D. Sarmiento (eds), *Pursuit of Legal Harmony in a Turbulent Europe* (Oxford: Hart Publishing, 2024), pp. 41-56.

Does this imply that this principle is fated to operate solely within an instrumental form, confined to interstate relations? Not necessarily. Pending and future litigation presents the Court with occasions to break free from the strictures of functional necessity and recognise solidarity claims anchored in the value-laden imperatives of dignity and inclusion that underpin the Union's constitutional order. Indeed, this value-based rationale is not merely an alternative path; it is, at times, the *only* analytically coherent way to justify the redistributive schemes that define a mature political community.

A telling example lies in the contested Council Regulation (EU) 2022/1854,<sup>59</sup> adopted in response to soaring energy prices. The Regulation introduces sweeping measures, rooted in solidarity, i.e. measures that move beyond Member State cooperation towards redistribution across economic actors and consumers. These include caps on market revenues of electricity producers (Articles 6 and 10), a mandatory solidarity contribution on surplus profits in the fossil fuel sector (Articles 14 and 17), and binding obligations to reduce electricity consumption (Articles 3 and 4). These mechanisms aim to protect vulnerable consumers, mitigate the unequal impact of the crisis, and ensure fair distribution of resources, as emphasised in multiple recitals.<sup>60</sup>

What makes this Regulation particularly significant is that solidarity is not merely deployed as a tool to maintain market stability or intergovernmental cooperation. Instead, it is invoked as a value-oriented response to structural imbalances, economic inequality, and the risks of energy poverty. The idea that those who benefit exceptionally during a crisis ought to contribute more to shielding the vulnerable reflects solidarity's redistributive ethos, not just its strategic utility.

This value-based dimension comes into sharp focus in *Vermilion Energy Ireland*,<sup>61</sup> a pending case before the Court of Justice challenging the legality of the Temporary Solidarity Contribution (TSC) established under Chapter III of the Regulation. The applicants contest the TSC on multiple grounds: that the Regulation exceeds EU competence under Article 122 TFEU; that it violates the principles of legal certainty and non-retroactivity; and that it infringes Articles 16 and 17 of the Charter by disproportionately interfering with business freedom and property rights. Nonetheless, the Regulation's justification for the TSC is explicitly grounded in solidarity when understood in value-laden, redistributive terms. Recital 57 of the preamble to the Regulation stresses the unequal exposure of Member States to the energy crisis, and the need for collective action to protect

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<sup>59</sup> Council Regulation 2022/1854 on an emergency intervention to address high energy prices, [2022] OJ L 261/1.

<sup>60</sup> Recitals 11–17, 43–52, 57.

<sup>61</sup> *Vermilion Energy Ireland (C-533/24)* [2024] OJ C 6632.

consumers, workers, and essential supply chains. In this reading, solidarity becomes the normative bond holding together crisis-era governance, rather than a mere policy mechanism for preserving market functionality.

Thus, to accurately appraise the legality of measures such as the TSC, the analysis must be situated within a framework that recognises solidarity as a fundamental value justifying redistributive burden sharing. This necessitates engaging directly with solidarity's value-based dimension, which is indispensable for addressing measures designed to mitigate vulnerability, particularly where that vulnerability is arguably linked to, or exacerbated by, the conduct of the contributor (i.e., the energy companies in this specific case). Without this reasoning, any assessment of solidarity demands around function grounds is destined to remain incomplete, particularly when confronting systemic crises that implicate core concerns of social justice.

### **Identity-based solidarity**

Union citizenship has long been one of the most contested features of the EU constitutional order, above all in the Court's account of its place within that order. Solidarity runs through this debate, shaping the scope of the social rights that attach to Union citizenship and tying those rights to European integration and a sense of belonging. At its core lies the problem of social Europe and redistribution: more precisely, the persistent absence of a robust redistributive architecture at the Union level.<sup>62</sup>

In its early jurisprudence on Union citizenship, notably in a series of landmark rulings on student finance in the early 2000s, the Court of Justice displayed a marked willingness to conceptualise citizenship as a 'fundamental status', invoking solidarity to justify the extension of access to social benefits. For instance, when asked whether Union citizens could claim social assistance when in need, the Court held that nationals of a Member State owe lawfully resident Union citizens a reasonable degree of financial solidarity, so long as the claimants do not become an unreasonable burden on the host state's finances.<sup>63</sup> The legislation made students' lawful residence contingent on financial self-sufficiency, yet the Court grounded that condition in the preamble, which states that 'beneficiaries of the right of residence must not become an unreasonable burden on the public

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<sup>62</sup> On the limited social-redistributive dimension of EU integration, see, G. de Búrca, "Towards European Welfare?" in G. de Búrca (ed), *EU Law and the Welfare State: In Search of Solidarity* (Oxford: Oxford University Press, 2005), pp. 1–10.

<sup>63</sup> *Grzelczyk (C-184/99) EU:C:2001:458* at [44].

finances of the host Member State'.<sup>64</sup> Notably, the Court invoked solidarity to construct a duty to grant access to the host state's social welfare system, and that extension proved controversial.<sup>65</sup> The Court later recalibrated its approach, allowing Member States to make a genuine degree of integration in the host state a precondition for access to social assistance.<sup>66</sup> What is worth to underlie here is that welfare support extended to other EU citizens is grounded in the societal relationship among the citizens of a Member State, and is conditional upon a sufficient degree of integration into the host society.

The early misstep of deducting distributive solidarity obligations without a solid normative grounding still weighs on the Court's reasoning.<sup>67</sup> The Court has recently invoked solidarity in the citizenship field, albeit in a but only in a restrained and instrumental manner, stopping short of constructing solidarity as a relational principle between Union citizens themselves. In *Commission v Malta*, the Court found that Malta's investor citizenship scheme "commercialised" national citizenship and, by extension, Union citizenship. The Court concluded that this transactional naturalisation is against the "very nature of the EU citizenship", thereby infringing Article 20 TFEU and the principle of sincere cooperation in Article 4(3) TEU.<sup>68</sup> From the start the Court relied on precedent to reject the view that Member States are entirely free to decide who becomes their national, and this is because Union citizenship depends on possession of a Member State nationality, EU law can impose constraints on naturalisation.<sup>69</sup> In developing the argument as to why EU law can set limits in this specific case, the Court presented EU citizenship as integral to the Union's constitutional architecture and central to integration, which it calls the Union's *raison d'être*.<sup>70</sup> On the Court's account, the rights attached to Union citizenship, coupled with its *ex lege* acquisition through possession of a Member State nationality, warrants characterising it as the fundamental status of Member State nationals.<sup>71</sup> Read together with the judgment's view that integration is the Union's *raison d'être* and that Union citizenship contributes to that project,<sup>72</sup> the

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<sup>64</sup> Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L317/59.

<sup>65</sup> For the critique of the Court's early jurisprudence on social solidarity, including Grzelczyk case, see C. Barnard, *EU Citizenship and the Principle of Solidarity*, in E. Spaventa and M. Dougan, *Social Welfare and EU Law* (Oxford: Hart Publishing, 2005), pp. 165-175, 180.

<sup>66</sup> *Bidar (C-209/03) EU:C:2005:169* at [56].

<sup>67</sup> *Chief Appeals Officer and Others (C-488/21) EU:C:2023:1013* (judgment stays with settled free movement doctrine); Compare with *AG Opinion Capeta's Opinion on the case, delivered on 16 February 2023, Chief Appeals Officer and Others (C-488/21) EU:C:2023:115*, at [134–140] (presenting a solidarity-based argument).

<sup>68</sup> *Commission v. Malta (C-181/23) EU:C:2025:283* at [95, 121].

<sup>69</sup> *Commission v. Malta (C-181/23)* at [81, 82].

<sup>70</sup> *Commission v. Malta (C-181/23)* at [91].

<sup>71</sup> *Commission v. Malta (C-181/23)* at [92, 100].

<sup>72</sup> *Commission v. Malta (C-181/23)* at [91].

Court's concern is the commercialisation of nationality, which it sees as hollowing out of the "very nature of the Union citizenship".<sup>73</sup>

An analytical reading through the lens of solidarity suggests that limits on commercialising EU citizenship rest on the civic bond *among the Union citizens*.<sup>74</sup> That bond, in turn, can be conceived independently of the nation-state and instead grounded in a democratic, values and rights-based political identity. If that EU citizenship is truly a fundamental status, as the Court suggests,<sup>75</sup> surely it presupposes some sense of belonging to the Union and to the values it embodies. Notably, the Court gestures toward those values, suggesting that EU citizenship is based on the Article 2 TEU values.<sup>76</sup> Those values can be read as the normative bond that underwrites EU citizen identity. Moreover, recognised as a fundamental principle now, solidarity is presumptively relevant across the constitutional order, including the domain of citizenship that the Court itself has stressed as a having a constitutional status. All the same, the Court retreated from developing an argument along that axis, one that is built on the relationship between the EU citizens, and instead, crafted an instrumental justification builds on of citizen-state bond and assorted EU law principles.

First, drawing on its case law, the Court described the bond of nationality as a special relationship of "solidarity and good faith" between a Member State and its nationals, marked by reciprocal rights and duties.<sup>77</sup> The question then remained why Union citizenship was implicated when the Treaties placed control over nationality with the Member States. In the Court's view, this special bond also underpinned the rights and obligations attached to Union citizenship under the Treaties.<sup>78</sup> The Court routed the point through mutual trust: a Member State that granted nationality, and thus Union citizenship, essentially in return for payments or investments, disregarded the requisite bond of solidarity and good faith, fractured the mutual trust sustaining Union citizenship, and breached Article 20 TFEU and the duty of sincere cooperation in Article 4(3) TEU.<sup>79</sup> As each State had to accept the others' conferrals of nationality at face value, the system operated on mutual trust built on the assumption that citizenship reflected a genuine, good

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<sup>73</sup> *Commission v. Malta (C-181/23)* at [95].

<sup>74</sup> For a persuasive argument that EU citizenship and identity can be detached from the nation-state and grounded in a liberal-democratic, rights-based political identity, P. B. Lehning, 'European Citizenship: Towards a European Identity?' (2001) 20 *Law and Philosophy* 257–259.

<sup>75</sup> *Commission v. Malta (C-181/23)* at [92, 100].

<sup>76</sup> *Commission v. Malta (C-181/23)* at [95].

<sup>77</sup> *Commission v. Malta (C-181/23)* at [96].

<sup>78</sup> *Commission v. Malta (C-181/23)* at [97].

<sup>79</sup> *Commission v. Malta (C-181/23)* at [99].

faith link.<sup>80</sup> If naturalisation became a transaction, that premise collapsed and so, too, did the mutual trust that sustained Union citizenship.<sup>81</sup> Likely the product of compromise, the reasoning provokes more questions than it answers and has drawn considerable criticism.<sup>82</sup>

Noticeably, the Court describes Union citizenship as “one of the principal concrete expressions of solidarity” that sustains integration and forms part of the legal order’s identity, reciprocally accepted by the Member States.<sup>83</sup> Yet the judgment does not develop this claim along the familiar citizenship axes of civic bond, shared identity, common values, and a jointly imagined future. The most plausible reading then is that solidarity refers to the rights attached to Union citizenship.<sup>84</sup> However, that move does not take the argument very far. In practice, the status confers a narrow and conditional set of entitlements; the exercise of free movement still turns largely on economic activity, and where no such activity exists, access often depends on integration into the host society. With little material redistribution attached to the status, presenting Union citizenship as a “concrete” expression of solidarity overstates its present constitutional reach. Most importantly, the kind of solidarity that could bear the analytical weight in this context arguably is inherently identity based. A citizenship grounded only in marginal rights and functional considerations cannot sustain the thicker obligations that the language of citizenship, that grants rights and obligations, implies.<sup>85</sup>

Is this then the Court’s entrenched reliance on instrumental reasoning, or a studied caution born of backlash to its earlier intervention on citizenship? It may well be both. One shall not preclude the possibility of a more sophisticated, albeit unarticulated, logic underpinning this approach.<sup>86</sup> What

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<sup>80</sup> *Commission v. Malta (C-181/23)* at [100].

<sup>81</sup> *Commission v. Malta (C-181/23)* at [101].

<sup>82</sup> Among others, see D. Kochenov and G. Íñiguez, “EU Citizenship’s New Essentialism” (2025) 50 E.L. Rev. 455-474; M. van den Brink, “Why bother with legal reasoning? The CJEU Judgment in *Commission v Malta (Citizenship by Investment)*” *VerfBlog*, 5/5/2025; S. Peers, “Pirates of the Mediterranean meet judges of the Kirchberg: the CJEU rules on Malta’s investor citizenship law” *EU Law Analysis*, 30/04/2025; J.H.H. Weiler, “Citizenship for Sale (*Commission v Malta*): Who of the Two is Selling European Values?”, *VerfBlog*, 14/4/2025.

<sup>83</sup> *Commission v. Malta (C-181/23)* at [93]

<sup>84</sup> These rights are articulated in the judgment explicitly, *Commission v. Malta (C-181/23)* at [86–90].

<sup>85</sup> This reflects a deeper tension in the Court’s jurisprudence, where the functional goal of “integration” is often prioritised over the development of a constitutional order grounded in human-centric principles. S. Garben, “Of ends and means” (2025) 50 E.L. Rev. 381-382.

<sup>86</sup> For a defence and reconstruction of the Court’s reasoning, see L. D. Spieker, “It’s solidarity, stupid!: In defence of *Commission v Malta*”, *VerfBlog*, 7/5/2025. Compare with L. D. Spieker and F. Weber, “Case C-181/21, *European Commission v. Republic of Malta*, Judgment of the Court (Grand Chamber) of 20 June 2023” (2025) 50 E.L. Rev. 501 (agreeing with the judgment’s overall direction but highlighting shortcomings in the reasoning used to support it). See also, M. Chamon, “*Commission v Malta (C-181/23)* and the trilemma of EU citizenship” (2025) 50 E.L. Rev.

is clear is that the Court's turn to the familiar terrain of sincere cooperation and mutual trust, coupled with a functional reading of solidarity, did not in the end make the outcome less contentious. Admittedly, these arguments presented here benefit from hindsight. Nevertheless, there is significant analytical value in explicitly recognising identity-based solidarity as such,<sup>87</sup> rather than recasting it in functionalist terms in the hope that economic freedoms will surreptitiously bear the justificatory burden. Doing so is not only a matter of candour; it also provides clearer doctrinal pathway for disputes in which sovereignty is central. The next section takes up that connection.

### **Solidarity and sovereignty**

Recent case-law provides valuable insight into how solidarity is doctrinally linked to, and reinforced by, the sincere cooperation and mutual trust and symbiotic relationship between them.<sup>88</sup> Yet, the jurisprudence remains in its infancy regarding the application of solidarity when it conflicts with other constitutional principles. This is acutely true for its relationship with the principle of subsidiarity, an interaction that demands an analysis framed by the broader concept of sovereignty to be fully understood.<sup>89</sup>

An instructive example where these themes converge is the pending action before the Court of Justice in which the French National Assembly brings direct action against the constitutionality of the Regulation 2024/1351 on Asylum and Migration Management.<sup>90</sup> The case is significant not only because it is the first time the so called 'red card procedure' is used to raise subsidiarity claim before the Court by a national parliament,<sup>91</sup> but also because the action seeks annulment of a legislative act, building a broader claim that is grounded on the notion of sovereignty. The Assembly asks for the annulment of the Regulation entirely or, failing that, specifically to

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475, 485 (arguing that the Court's reasoning was convincing for it merely delineated what is manifestly incompatible with EU citizenship, rather than assuming the power to determine who the Member States' citizens should be).

<sup>87</sup> I am indebted to Takis Tridimas for a thought-provoking debate on identity-based solidarity in connection to the case in hand.

<sup>88</sup> See, text to fn. 35.

<sup>89</sup> For an insightful account that argues how EU subsidiarity has been stripped of firm theoretical moorings, engages with its relation to sovereignty, see M. Cahill, "Theorizing subsidiarity: Towards an ontology sensitive approach" (2017) 15 *International Journal of Constitutional Law* 205.

<sup>90</sup> Regulation 2024/1351 on Asylum and Migration Management, amending Regulations 2021/1147 and 2021/1060 and repealing Regulation 604/2013 [2024] OJ L 1351 (Hereinafter Regulation 2024/1351 on Asylum and Migration Management).

<sup>91</sup> Protocol (No 2) on the application of the principles of subsidiarity and proportionality [2012] OJ C 326/206.

invalidate Part IV concerning solidarity.<sup>92</sup> Finally, for the purposes of this article, the action directly challenges a solidarity measure and, by implication, the underlying principle of solidarity.

At its core, the challenge targets the perennial flashpoint of asylum responsibility-sharing, namely the relocation of applicants for international protection, long one of the EU's most divisive policy debates. It is useful to recall that the Regulation is the outcome of drawn-out talks and succeeded a previous initiative that had set a far more ambitious solidarity agenda but fell through.<sup>93</sup> In addition, this is not the first-time the mandatory nature of a relocation scheme has faced judicial scrutiny.<sup>94</sup> Confronted with the 2015 spike in arrivals, the Union adopted its first mandatory relocation scheme.<sup>95</sup> When that measure was subsequently challenged, the Court upheld its validity rejecting objections about legal basis and dismissing claims of breach of subsidiarity and proportionality.<sup>96</sup> However, the Court's affirmation of the scheme's legality did not translate into full compliance. In a follow-up infringement action, the Court found that the defendant Member States had breached EU law by refusing to implement the relocation mechanism it had previously upheld.<sup>97</sup>

The present challenge is distinct from its predecessors in various respects. Primarily, the 2015 mechanism, which was at the centre of the debate, was enacted as a provisional emergency measure via Council Decision under Article 78(3) TFEU that confers upon the Council a broad, albeit temporary, mandate to address a sudden inflow of nationals of third countries. In stark contrast, the contested Regulation 2024/1351 on Asylum and Migration Management is a comprehensive legislative act adopted through the ordinary legislative procedure founded on Articles 78(2) and 79(2) TFEU. The democratic pedigree of the Regulation arguably raises the bar for its annulment by necessitating a more restrained approach from the Court.

Second, the litigation has turned to subsidiarity, invoking the standing mechanism provided by Protocol (No 2). Bringing together the principle of subsidiarity with Article 4(2) TEU, the French National Assembly argues that the relocation required under the Regulation, "is to the detriment

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<sup>92</sup> *Assemblée nationale v Parliament and Council (C-553/24)* [2024] OJ L 5616.

<sup>93</sup> Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final, 4.5.2016.

<sup>94</sup> *Slovakia and Hungary v Council (C-643/15 and C-647/15)*.

<sup>95</sup> Council Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L 248.

<sup>96</sup> *Slovakia and Hungary v Council (C-643/15 and C-647/15)*.

<sup>97</sup> *Commission v Poland and others (C-715/17, C-718/17 and C-719/17)*.

of the sovereignty, national identity, integrity of constitutional structures, and security of the Member States, which will be under an obligation to receive into their territory third-country nationals who are the subject of ‘relocation’ measures”.<sup>98</sup> The applicant also invokes Article 72 TFEU, commonly known as the ‘national security reservation’, asserting it as a fundamental expression of subsidiarity. On this basis, National Assembly contends that the relocation mechanism established by the Regulation would significantly constrain its core governmental functions, particularly law enforcement and safeguarding national security. Additionally, the applicant disputes the financial contribution methodology under the Regulation, arguing that it fails to adequately consider “reception capacity, social policy, identity of peoples, or security situation”.<sup>99</sup> Finally, the applicant further claims that, by overlooking these factors, the calculation mechanism undermines the broader social policy obligations envisaged under Article 151 TFEU.<sup>100</sup> Stripped back, these amounts to a sovereignty challenge.

It is useful to mention that, without being tied to subsidiarity, both national identity and national security issues were raised in relation to the temporary relocation scheme of 2015.<sup>101</sup> National identity, it must be noted, has played a modest role despite its elevation to constitutional provisions.<sup>102</sup> While the earlier case did not frame the issue explicitly in terms of national identity, related concerns were raised in connection with cultural and linguistic composition.<sup>103</sup> The Court, however, rejected such reasoning, holding that allowing considerations of ethnicity or culture would undermine the very principle of solidarity and violate the prohibition of discrimination under the Charter.<sup>104</sup> In rejecting claims based on national culture or ethnicity, the Court has prioritised the EU’s foundational values of solidarity and non-discrimination, thereby affirming the primacy of a shared European identity over fragmented national particularities. Similarly, the national security argument was dismissed, as the contested decision expressly allowed Member States to refuse relocation where there are reasonable grounds to regard an applicant as a danger to national security or public order.<sup>105</sup> The same reasoning would apply to national identity claims, and, given that the new scheme, in fact, includes provisions allowing Member States to refuse

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<sup>98</sup> *Assemblée nationale v Parliament and Council (C-553/24)*.

<sup>99</sup> *Assemblée nationale v Parliament and Council (C-553/24)*.

<sup>100</sup> *Assemblée nationale v Parliament and Council (C-553/24)*.

<sup>101</sup> *Slovakia and Hungary v Council (C-643/15 and C-647/15)*.

<sup>102</sup> T. Konstadinides, ‘Dealing with Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity in European Judicial Discourse’ (2015) 34 *Yearbook of European Law* 131–133.

<sup>103</sup> *Slovakia and Hungary v Council (C-643/15 and C-647/15)* at [302].

<sup>104</sup> *Slovakia and Hungary v Council (C-643/15 and C-647/15)* at [304–305].

<sup>105</sup> *Slovakia and Hungary v Council (C-643/15 and C-647/15)* at [307–308].

relocation on national security grounds,<sup>106</sup> there appears to be limited scope for a different outcome.

Arguably, the shift reflects subsidiarity's limited bite in litigation: the Treaty's test, while not empty, is thin and applied with marked deference.<sup>107</sup> The stated justification for the Regulation's compliance with the principle of subsidiarity is that its objectives, namely the establishment of criteria and mechanisms for determining the Member State responsible for examining applications for international protection and the introduction of a solidarity mechanism, cannot be effectively fulfilled by individual Member States, "by reason of the scale and effects", and are considered better addressed through action at the level of the Union by comparison.<sup>108</sup>

A closer examination of the Regulation reveals that the relocation mechanism, which the applicant especially problematizes is not a general system of continuous responsibility sharing, but rather a demand-triggered framework that is designed to respond to situations of migratory pressure.<sup>109</sup> The underlying expectation is that Member States should be capable of managing their responsibilities, with pressure arising not from structural unpreparedness but from exceptional circumstances such as an influx situation.<sup>110</sup> The fact that Member States are, in principle, left to absorb such situations autonomously until it amounts to a pressure attest to a deliberate restraint in the exercise of centralised authority at the EU level in relation to responsibility sharing.

When it comes to situations of pressure, the case for Union action becomes more evident from the perspective of solidarity. While it is true that a subsidiarity justification resting solely on the Member States' inability to achieve a harmonised approach may appear simplistic, there are

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<sup>106</sup> Regulation 2024/1351 on Asylum and Migration Management, Article 67.

<sup>107</sup> For the critique of Court's approach, see G. de Búrca, "The Principle of Subsidiarity and the Court of Justice as an Institutional Actor" (1998) 36 *Journal of Common Market Studies* 217, 218–19; S. van Hecke, "The Principle of Subsidiarity: Ten Years of Application in the European Union" (2003) 13 *Regional and Federal Studies* 68-69. See also, T. Horsley, "Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?" (2012) 50 *Journal of Common Market Studies* 270–271 (arguing that while formal subsidiarity review under Article 5(3) TEU is deferential, the Court is more willing to undertake a "de facto subsidiarity review" when such concerns are refracted through the lens of the legal basis analysis). See, on the other hand, F. Fabbrini, "The Principle of Subsidiarity" in R. Schütze and T. Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford: Oxford University Press, 2018) p. 221 (arguing that while the Court exercises a limited and deferential review of subsidiarity and that political safeguards are the more appropriate means of ensuring compliance).

<sup>108</sup> Regulation 2024/1351 on Asylum and Migration Management, Recital 88. See also the objectives of the Regulation as set out in Article 3, also including the setting up a common framework for asylum and migration management.

<sup>109</sup> Articles 11, Article 57.

<sup>110</sup> Article 11 (3), Recital 9.

compelling arguments for a centralised approach in the context of responsibility sharing. When responsibility sharing is left to *ad hoc* pledges, contributions remain uneven, timing proves poor, and needs go unmet. It is crucial to emphasise that, the constitutional framework does not ask for discretionary help. This is unequivocally established by Article 80 TFEU, which imposes a positive solidaristic action based on duty of fair sharing; a requirement that support be distributed according to objective, equitable criteria, not merely sincere goodwill. On that premise, it is sound to claim that Member States, acting individually or through loose bargains, are not equipped to achieve equitable distribution among themselves in the absence of an organised collective action. Union action can supply a common allocation key, a Union floor of effort, enforceability, and a coordinator that matches needs to pledge across the system. Indeed, it can be argued that subsidiarity is satisfied only where solidarity is mandatory and the scheme is built for equitable responsibility sharing.<sup>111</sup> The results are disappointing;<sup>112</sup> nonetheless, mandatory relocation outperforms voluntary schemes, which is effectively what ‘solidarity’ becomes when left to Member States.

In addition, and crucially, any subsidiarity analysis in the field of migration should remain attuned to the fact that the principle of solidarity is not solely a matter of inter-state coordination, but also intimately linked to the lived realities of people on the move. While it is true that the express articulation of solidarity in this domain focuses on the obligations between the Member States, and has predominantly been developed on instrumental grounds to ensure the sustainability of the Common European Asylum System, it nonetheless operates in service of asylum seekers themselves. Solidarity between States, when operationalised, carries derivative effects for individuals seeking protection, and its absence may expose them to conditions that risk becoming inhuman, particularly when the responsible Member State is under strain and their rights are thereby jeopardised. The justification for Union-level action should therefore be evaluated not only in institutional or systemic terms, but also in light of the human vulnerability that such action is designed to alleviate.<sup>113</sup>

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<sup>111</sup> See L. Marin and E. Pistoia, “Captured between subsidiarity and solidarity: any European added value for the Pact on migration and asylum?” (2021) 2 *Freedom, Security & Justice: European Legal Studies* 169–170 (arguing that the European added value test is passed only if adequate solidarity is achieved).

<sup>112</sup> European Court of Auditors, *Special Report No 24/2019: Asylum, relocation and return of migrants: Time to step up action to address disparities between objectives and results*, at [36].

<sup>113</sup> G. Noll, *Negotiating Asylum* (The Hague: Kluwer International, 2000) pp. 332–336 (offers a persuasive account of the subsidiarity principle in the context of responsibility sharing, arguing that any meaningful assessment of subsidiarity must incorporate the human dimension, particularly the rights and needs of protection seekers).

Even if it fails on narrow legal grounds, the challenge successfully puts a fundamental question on the table: what kind of Union is this? Subsidiarity, as it is envisaged in the Treaties and applied in judicial review, offers a slender foothold; as past case-law shows, sovereignty-inflected objections are more readily handled through proportionality review.<sup>114</sup> At the same time, this litigation creates space to consider the dispute in terms of the Union's identity and foundational principles, including solidarity. That nexus is especially salient where the 'necessity' limb of proportionality cannot do the heavy lifting, and the outcome ultimately turns on strict balancing. Put bluntly: to what extent do solidarity demands, grounded in economic efficiency and system stability, warrant overriding appeals to national or cultural identity? Posed this way, the debate becomes one about constitutional change, and yes, the spectre of European sovereignty.

## Conclusion

This analysis has established that, while solidarity has accrued significant constitutional weight as a fundamental principle of the EU legal order, its doctrinal contours remain strikingly underdeveloped. The practice of the EU's institutions demonstrates a versatility that complicates the development of a coherent analytical framework. Ultimately, if not for the sake of academic curiosity alone, the very potential of this principle to shape EU constitutionalism is the strongest argument for developing greater doctrinal clarity.

This article advances a rationale-sensitive framework that gives solidarity practical bite while acknowledging the plurality of its drivers. It locates the principle's normative force at the intersection of three sources: (i) the functional imperative of sustaining common institutions, (ii) universal axiological claims grounded in dignity and fairness, and (iii) the affective bonds of political community and belonging. By anchoring its analysis in these rationales, the article links solidarity to its theoretical foundations and yields a clearer, more persuasive method for adjudication and policy design: ask why solidarity is required in a given context and let that answer calibrate who owes what to whom, and with what intensity.

On this note, finally, this article makes a case for an open debate on how solidarity intersects with conceptions of identity and sovereignty, the elephant in the room. Market logics have long shouldered the justificatory burden, but they cannot on their own sustain the expression of solidarity, which is emerging slowly but surely. EU law already manifests solidarities of different kinds; attempts to compress them all into market efficiency or system-stabilisation miss what is

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<sup>114</sup> *Slovakia and Hungary v Council (C-643/15 and C-647/15)* at [301–309].

distinctive and normatively compelling about the principle's reach. If we are to use it, let's call it what it is.